Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

ARTURO OROZCO-VASQUEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does a reviewing court have a responsibility, under 18 U.S.C. § 3742 (e) or other applicable standards of review, to review a ~~sentencing~~ court's factual findings for clear error or may it recast those erroneous factual findings as "judicial observations that explain conclusions about sentencing factors" and then employ *Booker's* reasonableness review to affirm a sentence that was 42 months above the advisory guideline sentence?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, for which review is sought, is United States vs. Arturo Orozco-Vasquez, No. 05-3920, 469 F. 3d 1101 (7th Cir. December 6, 2006) (Appendix A). The district court judgment sought to be reversed is United States v. Arturo Orozco-Vasquez, No. 05 CR 87 (E.D. Wisc. September 26, 2006 and October 5, 2006)

JURISDICTION

Judgment was rendered in the United States Court of Appeals for the Seventh Circuit on December 6, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

18 U.S.C. § 3742(e) (relevant portions):

> Upon review of the record, the court of appeals shall determine whether the sentence . . .
>
> . . . The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous . . .

STATEMENT OF THE CASE

On June 13, 2000, Arturo Orozco-Vasquez plead guilty to Count 1 of the indictment, alien in possession of a firearm, in violation of 18 U.S.C. § 922 (g)(5); and Count 3,

illegal re-entry in violation of 8 U.S.C. § 1326 (a). The defendant's plea was pursuant to a written plea agreement. On June 14, 2005, a jury convicted the defendant of Count 2, possession of more than 500 grams of cocaine with intent to deliver, in violation of 21 U.S.C. § 841 (a) (1) and (b)(1)(B) and 18 U.S.C. § 2. The Honorable Judge Rudolph T. Randa presided at the trial and over the plea.

On September 26, 2005, the Honorable Judge Rudolph T. Randa sentenced the defendant to 63 months on Count 1; 120 months on Count 2; and 24 months on Count 3, with the sentences on Count 1 and 3 to run concurrent to the sentence on Count 2. On December 6, 2006, the United States Court of Appeals affirmed the convictions and sentence.

A. Statement of Facts.

On November 23, 2004, at approximately 11:00 p.m., Milwaukee Police Officer Todd Bohlen and several other officers arrived at 3122 South 13th Street, Milwaukee, Wisconsin to investigate an informant's tip that the residence housed a drug dealing operation. The informant had told the police that Arturo Orozco-Vasquez would be at 3122 South 13th Street and that drug trafficking was occurring at the residence. Bohlen knew Mr. Orozco-Vasquez as Reynaldo Elizardo, and that under that name, there was a warrant for the defendant's arrest. The police eventually made a warrantless entry into the residence.[1] Upon entry, Bohlen could hear the sound of water running loudly. After walking down a hallway, Bohlen saw the defendant, Mr. Orozco-Vasquez, exit a bathroom, with his hands up. Bohlen could see

[1] The legality of the entry was not an issue before the Appellate Court.

that Mr. Orozco-Vasquez's arms, hands and chest were soaking wet.

Bohlen secured the defendant, placing him under arrest. Bohlen went into the bathroom and found the hot water tap of the bath tub running at full capacity. The tub drain was open. Bohlen admitted that his police report did not state that he found hot water running. Bohlen claimed to smell a strong odor of cocaine in the bathroom and apartment. He also gave an opinion that he believed that the defendant was using the hot water in the tub to flush drugs down the drain. The defendant objected to that opinion. Bohlen had previously testified that, in his extensive drug investigation background, persons wishing to destroy cocaine used hot water to dissolve it.

Bohlen also searched a bedroom located inside the apartment, just across from the bathroom. It was the only room with access, via a spiral staircase, to the attic. Bohlen went to the attic and found what he described to be a kilo press and a blue book bag. He also noticed an open window which was facing in the direction where officers had observed someone throwing the cocaine onto nearby roofs. In the bedroom itself, officers recovered a functional scale, two bottles of inositol (one was a quarter full; the other was empty), baggies, a blue strainer, plastic wrap, dryer sheets, and duct tape. The officers also recovered a knife with cocaine residue and a quarter kilo of cocaine inside the bedroom. Bohlen had previously testified that, in his experience, inositol was often used as a mixing agent in cocaine to "stretch" its volume, and thus its economic value to the dealer. Bohlen also agreed that the bedroom belonged to Fernando Campos-Ruiz, another individual found at the residence. The officers entering the apartment had found Campos-Ruiz in the bedroom, with the quarter kilo of cocaine at his feet. At the time of arrest, a different bedroom was occupied by another individual, one Diego Moreno.

Bohlen testified that, in all, the police recovered four packages containing cocaine, each being approximately 250 grams. Bohlen also testified concerning the workings of the kilo press.[2] Additionally, Bohlen testified to a home experiment in which he engaged. He testified that he put a t-shirt on, got down on his knees next to, or in front of his tub with the water running and pressed his hands on the drain to simulate an effort to stuff cocaine down the drain of the tub. The defense objected to this testimony, and the district court overruled the objection. This example of the scientific method in action produced, according to Bohlen, a wet t-shirt. Officer Douglas Knueppel, a latent fingerprint examiner for the Milwaukee police department, identified the defendant's fingerprint on the scale and on the inositol bottles. The prints recovered from the items did not match Diego Moreno or Fernando Campos-Ruiz, the other individuals found in the apartment. The Government then rested. The defendant did not testify and the defense put on no further evidence. The district court denied the defendant's motion for a directed finding. The jury found the defendant guilty on the drug count.

The district court sentenced the defendant to 120 months on Count 2, the drug count. Pursuant to the Guideline calculation, which the district court accepted as correct, the defendant faced 63-78 months for the drug count, as a category I offender. The Government filed and argued an upward departure motion, requesting that the Court sentence the defendant above the applicable sentencing guideline.

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[2] The testimony concerning the workings of the press, and its prior use, were consistent with Bohlen's testimony at sentencing. We will not repeat them, here, but set them out in that section of the factual statement, supra.

To support its allegations, the Government again called Milwaukee Police Officer Todd Bohlen. Bohlen testified that he is assigned to the Police Department's Gang Squad on the "Mexican Posse," a Milwaukee street gang. Bohlen testified that he reviewed the reports about a 2000 stop where Reynaldo Elizardo, a.k.a. the defendant, was found with a gun in his shoe. Bohlen testified that at the time of the 2000 arrest, the defendant was with Humberto Rongell and Ario Rocay, two known Mexican Posse members. Bohlen testified that the defendant was convicted of a state offense for possession of the gun and sentenced to six months under the Elizardo name. The defendant, Bohlen testified, never served a day of that sentence. Under cross, Bohlen agreed that he did not really know if the defendant served the sentence. The defense then agreed that Bohlen was an expert on drug trafficking.

Bohlen then testified about the cocaine press found in the attic when the police arrested the defendant. Bohlen described the press as "several plates of steel with a long drill rod with nuts on it, angle iron plates, and a bottle jack with jack handles along with other items used to press cocaine into the brick form." Bohlen examined the "press" and the "contact surfaces where the top of the bottle jack had a square and semi-square pattern on it. How it (sic) contacted the metal plates as part of the pressing procedure." Bohlen told the Court that he had seen a similar press in the past and had previously testified about one in relation to large scale drug operations. Bohlen testified that his examination of the press in this case showed certain depression marks on the metal plates that formed the top of the press. The marks, Bohlen opined, were caused by contact between the jack and the metal plate. The marks would be made when sufficient force was applied to leave the depressions. The contact point of the jack, or the jack head, had several rectangular shaped protrusions on it; contained in a

circular area, with a diameter of 1 ½ inches. The metal plate had markings, Bohlen claimed, from the jack head coming into contact with the plate. The fact that the imprints were on two different areas on the plate were the result, according to Bohlen, of the plate being put in a different position when the press was used on various occasions.

The press could make a one kilogram or a half kilogram block of cocaine. Bohlen had no way to determine if the press was used for half or whole blocks. Bohlen testified that his examination of the plates revealed, in his "conservative estimate" that it was used nine times. Bohlen broke that conclusion down to four on one portion of the plates, and five on another. Bohlen explained that the jack head was circular and filed with rectangular protrusions. By looking at the depressions, Bohlen could see nine "complete" depressions. The depression marks showed that someone had used the press at least nine times. If that person made half kilos each of those nine times, then they pressed four- and-a-half kilograms of cocaine. Bohlen agreed that he did not know whether the defendant had made the nine impressions. Bohlen also agreed that he could not testify that the defendant even used the press. Bohlen further agreed that he was assuming that the nine different impressions came from nine separate half kilos of cocaine, rather than from multiple presses of a single half kilo.

Bohlen testified that a person does not become a drug dealer in half to one kilo amounts without having previously sold other large amounts of cocaine. The Government then asked the Court to consider the sentencing hearing of a co-defendant, Campos-Ruiz. This request was in response to the defendant's objection concerning the Government's attempt to ask Bohlen if Campos-Ruiz was afraid to testify against the defendant. The district

court ruled that it could consider the presentence report for Campos-Ruiz's sentencing.

Bohlen also testified, concerning the defendant's assertion, that he had not been a member of the Mexican Posse since 1997. Bohlen testified that during the 2000 arrest, the defendant was arrested with members of the Posse. Pictures obtained by Bohlen show the defendant displaying Posse gang signs, with others, on November 29, 2003. The other photos were not dated. The Government introduced the defendant's 1996 booking photo. Bohlen then testified that when Bohlen first met the defendant in 1997, he (the defendant) had hair similar to that depicted in the 1996 photo. Bohlen testified that in 1998, the defendant had shorter hair. Bohlen, looking at the "maturing on his face, the hairstyle, the height and weight (sic) . . ." concluded that the pictures were all taken after 1998.

Bohlen described the individuals in the photos as "representing" their gang, the Mexican Posse, by giving certain hand signals. The defendant is identified in some of the pictures as displaying gang hand gestures. Bohlen testified that, aside from the fact that the defendant associated with Mexican Posse members, he based his conclusion that the defendant was a high ranking gang member on interviews with other Posse members. Bohlen agreed that he could not turn those interviews over to the defense counsel because they involved an on-going investigation. Bohlen testified that, in 1997, he had 5 or 6 contacts with the defendant. Bohlen thought his "memo book" might reflect the contacts but he did not bring the book to court.

The Government also referred to three phone calls that it contended showed the defendant was involved in on-going large scale drug operations. The Government appeared to be referring to a September 12, 2005 memo. The Government provided no testimony, such as a law enforcement officer with relevant experience and expertise

in discerning the meaning of such conversations, to explain the meaning of the certain alleged "code" words. Rather, the Government submitted a mem ~ from Milwaukee Police Officer Rudolo Gomez regarding a "summary" of the calls. Trial counsel objected to the Court's reliance on the tapes, arguing that the Government provided only a "brief opportunity" to hear the calls and that the tapes were in Spanish and never turned over to the defendant. Trial counsel objected on the grounds that the summary of the tape recordings refer only to "possible" or "possibly" being related to narcotics or a "probable" reference to money.

The Government also argued that the Court should consider the State conviction for C.C.W. (possession of the gun in the shoe) despite the fact that it agreed that it should not be considered under the Guidelines. The Government's main contention was over whether the defendant served his six month sentence for the charge. The Assistant United States Attorney stated that she was "not sure if he did or didn't" serve the sentence, but argued that it was a sentence that "he totally avoided." The Government argued that because the defendant used a fictitious name, law enforcement could not determine whether the defendant was illegal, therefore allowing him to avoid a State felony charge. The Government also asked the Court to consider the fact that the defendant was an illegal alien: "the fact that he is an illegal alien is something that the sentencing guidelines do not take into consideration. And I think the Court should take those into consideration. That is, that this Defendant not only is an illegal alien from Mexico, but appears to be going back and forth to get drugs from Mexico and to distribute drugs."

The Government also claimed that the defendant lied to the Court when he "tried to deliberately portray himself as someone who left the gang, as someone who has never done—involved himself at all in drugs . . ." The Govern-

ment argued that the tapes proved that the defendant was lying about his involvement in drugs. The defense argued that there was no evidence that the defendant owned or ever used the kilo press. The Government, the defense contended, never proved that the defendant owned or stayed at the house where the press was recovered.

B. How the question was presented.

The district court then began its sentencing analysis, indicating that it denied the Government's objection concerning the sentencing calculation, pursuant to the Guidelines. The Court then articulated the § 3553 (a)(1) standard to "impose a sentence sufficient but not greater than necessary." The Court then, while acknowledging that "the nature and circumstances of the offense" are "already taken into account by the sentencing guidelines" stated that it "has to look at (the nature and circumstances of the offenses) in light of the Government's motion a little more carefully." A more fundamental consideration, the Court stated, was the history and characteristics of the defendant. Accordingly, "the Court is free to deviate from the sentencing guidelines if it finds a reasonable basis for doing so . . ."

The district court found that drugs and gangs are dangerous and destroy communities, including the south side neighborhood where the judge, at one time, played football. The Court found that the defendant is "legally a drug dealer." The Court found that the defendant was arrested in a "drug house." The Court credited the statements of Campo Ruiz, that he saw the defendant come down from the attic and, just before, heard a "big clunk," a sound the judge found to be the press dropping. The Court then stated "I am going to make a finding that the

drugs that Mr. Campos Ruiz saw you take into the bathroom are being flushed down the bathtub."

The Court concluded that, looking at the denial of culpability in this case, as well as the defendant's history, that he was "a liar." The defendant was also a "scofflaw" for returning to the United States after being removed, and using a false identity. The Court found that by using the false identity when the defendant was arrested on the gun charges, he was lying to the police.

The Court found that the defendant's statement that he quit the gang, after being shot in '97, as well as the defendant's explanation that the shooting was over a stolen car dispute with a neighbor, was a lie. The Court concluded that "I can't believe that. The inference that I would draw is that you were a member of a gang and some other gang shot you in the head in some kind of dispute."

The Court looked to the photos, stating " . . . I have seen a lot of these photos . . . I have seen a lot of gang photos, okay . . . this is a gang." The Court credited Officer Bohlen's conclusion that the defendant had aged in the alleged gang photos, beyond the years of his 1996 booking photo. The 2000 arrest with known gang members corroborated this conclusion, according to the Court. The Court found the defendant to be an "associate member" of the gang.

The Court then considered the tapes stating that "I have seen a lot of tapes, a lot of drug deals, a lot of conversations. Yeah. Did you pick up any six shirts today? As if guys would call up and ask if they're going to pick up six shirts. Or did you pick up my golf balls?. . . But this is all drug talk. It's like a language all its own. It's clearly identifiable."

Under the deterrent effect of the sentencing, as well as protection, the Court found that the defendant could not

be deterred. The Court further found that the defendant had not served the sentence for his State charge of possession of a weapon. The Court found that a long sentence is required because the defendant has a history of committing a crime, serving a shorter sentence, being deported, and returning to commit other crimes.

The Court concluded as follows: "[w]hen I was sitting on the State bench in the old days I had the discretion to sentence to the maximum. And if I wasn't constrained by the sentencing guidelines, you'd get a much longer sentence than I am going to impose. And I am going to sentence you to 120 months. I think that's a reasonable sentence the way the Seventh Circuit would interpret it, given all that I said."

The Seventh Circuit affirmed the sentence, holding that the defendant's attack on the district court's fact finding was "misplaced. There is a difference between formal factual findings and judicial observations that explain conclusions about sentencing factors, and Orozco-Vasquez has confused the two." (Appx. pg. 38) The Court of Appeals acknowledged that sentencing related factual findings that are clearly erroneous cannot stand. (Appx. pg. 43-44) The Court made a distinction, however, between "explicit" and "formal" fact finding and a "fact-based statement a Judge makes at sentencing" that is more akin to "observations and assessments that form the basis of the Judge's consideration of the § 3553 (a) sentencing factors." (Appx. pg. 43-44) The Court, citing its prior decision in *U.S. v. Dean,* 414 F.3d 725, 729-30 (7th Cir. 2005) held that "only where a particular fact is contested and 'decisive to the choice of sentence' must there be explicit fact-finding to support the judge's exercise of sentencing discretion." (Appx. pg. 44) Consideration of the factors, and "observations about such factors" need only be reasonable. (Id.)

Despite the district court's explicit decision to make findings that were decisive to the increased sentence, the Seventh Circuit recast the findings as "observations" and affirmed the sentence. (Appx. pg. 46-48)

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S USE OF "REASONABLENESS" REVIEW TO AFFIRM THE DEFENDANT'S SENTENCE, DESPITE THE DISTRICT COURT'S RELIANCE ON UNSUPPORTED FACTUAL FINDINGS, PRECLUDED MEANINGFUL REVIEW OF THE DEFENDANT'S SENTENCE.

A. Argument summary.

In *Booker*, Justice Scalia warned that the newly imposed "reasonableness" review of federal sentences might "be a mere formality, used by busy appellate judges only to ensure that busy district judges say all the right things when they explain how they have exercised their newly restored discretion(.)" *Booker*, 543 U.S. at 313 (Scalia, J., dissenting) In the present case the Seventh Circuit has utilized "reasonableness" review to change the district court's clearly erroneous factual findings into "all the right things" by characterizing the findings as the district court's "observations" of the relevant § 3553 factors. *Booker* did not mandate the application of the reasonableness review standard to sentencing related factual determinations that do not result in a sentence above the statutory maximum. Application of the more stringent clear error standard is required to insure accuracy in the application of the § 3553 factors and hence, sentencing.

The district court sentenced the defendant to 120 months – 42 months in excess of the advisory guideline range -- by relying on "facts" that were unsupported by

the record. This district court made specific findings of fact, making it clear that the factual findings were the engine driving the increased sentence. The Seventh Circuit refused to conduct any meaningful review of these "findings." Rather, it mischaracterized the factual findings as "observations" related to the sentencing court's obligation to arrive at a sentence by looking to the factors set out in 18 U.S.C. § 3553(a). The Seventh Circuit then concluded that the defendant's sentence was "reasonable" pursuant to *Booker*'s admonishment that the "reasonableness" of a sentence is the touchstone of its appellate review.

B. Relevant Legal Framework.

The *Booker* decision certainly changed how a district court must arrive at a particular sentence. It also changed how reviewing courts insure that a given sentence comports with factors mandated by 18 U.S.C. § 3553. This Court is currently considering whether reasonableness review, with the appellate courts' post-*Booker* presumption that all Guideline sentences are reasonable, violates *Booker's* admonishment that a district court consider the Guideline sentence as one factor in arriving at a sentence that is "sufficient, but not greater than necessary, to comply with the purposes set forth" in the relevant provisions of § 3553. *Claiborne v. United States*, 127 S. Ct. 551, 166 L. Ed. 2d 406 (cert. granted, Nov. 3, 2006); and *Rita v. United States*, 127 S. Ct. 551, 166 L. Ed. 2d 406 (cert. granted, Nov. 3, 2006).

The question here is whether reasonableness review has replaced the requirement that a reviewing court review factual determinations that affect a sentence determination for clear error, whether the clear error standard has its basis in 18 U.S.C. § 3742(e) or some other source. The Third Circuit has recently rejected an ap-

proach that would replace clear error review with reasonableness review, at least as that review relates to factual determinations necessary to Guideline determinations. *U.S. v. Grier*, 475 F.3d 556 (3rd Cir. 2007)

The Seventh Circuit's opinion in this case is in conflict with *Grier*, despite its lip service to clear error review. There is no question that a sentencing court must, as *Booker* mandates, consider the factors set out in 18 U.S.C. § 3553 in fashioning a sentence. *U.S. v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). But it is also true that "clear error" review survived *Booker*. Although this Court excised provisions of 18 U.S.C. § 3742(e) that made the Guidelines mandatory, it is not altogether clear whether this Court left untouched the statutory provision that requires a reviewing court to "accept the findings of fact of the district court unless they are clearly erroneous . . ." *Booker*, 543 U.S. at 271 (Appendix to *Booker* opinion, setting out 18 U.S.C. § 3742(e)). If that provision of the statute is not in effect, the Circuits are, for the most part, maintaining "clear error" review of sentencing related factual determinations. *Grier*, 475 F.3d at 569 (collecting cases) As articulated by the *Grier* Court, the application of the clear error standard survived *Booker*. *Grier*, 475 F.3d at 570, 572 (rejecting reasonableness review for sentencing related fact finding and maintaining the clear error approach, holding that "[t]he opinion in *Booker* did not alter the burden of proof or the standard of review for findings of fact relevant to sentencing" while acknowledging that, at least for factual finding related to the Guideline calculation "[d]espite the excision of subsection (e) of 18 U.S.C. § 3742 (by this Court in *Booker*), this Court will continue to review factual findings relevant to the Guidelines for clear error and to exercise plenary review over a district court's interpretation of the Guidelines")

There is a meaningful distinction between "clear error" review and "reasonableness" review that the Seventh Circuit has glossed over in its decision in this case. As the *Grier* Court reasoned, to "review findings of the district court for "reasonableness," is also unfeasible. The Supreme Court explained in *Booker* that review for "reasonableness" is meant to assess the ultimate sentence imposed, to determine whether the sentencing judge gave meaningful consideration to the factors of 18 U.S.C. § 3553(a). (*Booker,)* 543 U.S. at 260-61. Nothing in *Booker* suggests that the same standard is to be applied to evaluate the quantum of evidence offered in support of a particular finding of fact, even one that played a role in the court's final sentence. Indeed, application of the "reasonableness" standard, with its broad focus on policy goals, would be incompatible with review of factual findings." *Grier*, 475 F.3d at 569

Reasonableness review also has been considered more deferential than clear error review, making it particularly unsuitable for reviewing factual findings. More concretely, a reviewing court may uphold something as "reasonable" even if it concluded that the issue was incorrectly or wrongly decided. *Lockyer v. Andrade,* 538 U.S. 63 (2003) (in the context of federal habeas appellate review of a state court's application of federal precedent "[t]he gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness") citing *Williams v. Taylor*, 529 U.S. 362, 412, (2000); *Bell v. Cone,* 535 U.S. 685, 698 (2002). As for clear error, a "finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v.*

Bessemer City, 470 U.S. 564 (1985) quoting *U.S. v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

A more rigorous standard of review for sentencing related fact finding is necessary to insure that a district court's post-*Booker* sentencing discretion is constrained by consideration of sufficiently established facts. A district court is not prevented, by *Booker* or the Sixth Amendment, from making factual findings that may increase a defendant's sentence, just so long as those findings do not increase the sentence over the authorized statutory maximum. But this discretion must be moored to both the relevant § 3553 factors and to accurate factual finding. The role of fact finding in sentencing was articulated by the Seventh Circuit in *Dean*:

> Explicit fact finding *is* required, however, if, though only if, contested facts are material to the judge's sentencing decision. A judge who thinks that a particular contested characteristic of a defendant may be decisive to the choice of sentence, such as the defendant's mental or emotional state, must resolve the factual issue in the usual way, that is, by making findings on the basis of evidence, just as he would have to do in applying the sentencing guidelines if, as in the present case, the calculation of the guidelines sentence depends on the resolution of a factual dispute.
>
> This does not mean trial by jury, proof beyond a reasonable doubt, consideration limited to evidence that satisfies the requirements of admissibility that are found in the Federal Rules of Evidence, or any other such formalities. (citations omitted) Only when factual determinations *require* a particular sentence does the Sixth Amendment come into play, imposing formalities on factual determinations (other than criminal history) that influence sentence length.

Dean, 414 F.3d at 730; *U.S. v. Roche*, 415 F.3d 614, 618 (7th Cir. 2005); see also *U.S. v. Johnson*, 227 F.3d 807, 813 (7th Cir. 2000) Despite Seventh Circuit's focus, in *Dean*, on the district court's consideration of what factual determinations are relevant to sentencing, in this opinion it has abandoned that focus for an approach that merely asks if the district court considered the appropriate § 3553 factors. Such an approach is insufficient to insure that sentences are based on accurate factual findings. The Seventh Circuit's use of reasonableness review in this case is in conflict with the traditional approach of appellate courts in reviewing sentencing related factual determinations, as well as the approach of other Circuits have taken on the question.

C. Reasons to grant the writ.

There are several reasons why this Court should reject the Seventh Circuit's approach and grant the writ. First and foremost, this Court should correct the error in this case, whereby the defendant received an additional 42 months of imprisonment based on clearly erroneous factual findings at sentencing. Furthermore, this Court should clarify the scope of reasonableness review for federal sentences as it is applied to factual determinations that increase a defendant's sentence beyond the advisory guideline level. Nothing in *Booker* modified a reviewing court's obligation to review sentencing related factual determinations for clear error where those determinations merely support a district court decision to sentence within the applicable statutory range. This Court should make it clear that reasonableness review is an overarching standard of review intended to give deference to a district court's reasons for a particular sentence; it is not meant to replace the less deferential standard of clear

error for reviewing the factual determinations that underpin those reasons.

This Court should also insure that appellate courts are exercising meaningful review of the facts that a district court relies on to arrive at a particular sentence. Reasonableness review should not be a tool appellate courts use to recast a district court's flawed factual determinations into "observations" related to the § 3553 factors. The district court made findings of fact, albeit in error, that it considered to be decisive to increasing the defendant's sentence. The Seventh Circuit's obligation, pursuant to either 18 U.S.C. § 3742 (e) or the traditional standard applicable to reviewing sentencing related factual determinations, was to review these findings based on the sentencing related evidence before the district court. When it recasts the errors, rather than remands with instructions to the district court to make proper findings, it merely lays the groundwork for similar errors in future cases.

Finally, reviewing factual determinations for clear error is a statutory mandate that serves the important purpose of insuring that the evidence relied on at sentencing has sufficient indicia of reliability to support its probable accuracy. Reliable fact finding at sentencing insures that sentencing disparities are based on real, significant, and relevant differences among otherwise similarly situated defendants. The Seventh Circuit's opinion in this case fails to properly address all of these considerations.

D. The sentencing errors in this case.

It is clear that the Seventh Circuit did not employ a clear error standard when reviewing the factual findings of the district court. Rather, it applied a reasonableness standard. Despite the district court's specific factual findings (Campos Ruiz saw the defendant bring cocaine into the

bathroom; defendant lied about the way he was shot in 1997; that the tape contained coded drug language; defendant did not serve his State sentence) the Seventh Circuit found them to be reasonable observations related to the district court's § 3553 analysis. The district court was, however, making factual findings that were clearly erroneous. The district court relied on a memorandum from Milwaukee Police Officer Gomez where Gomez claimed that the Defendant was heard making telephone calls that "possibly" referenced drug deals. Something is not more likely true than not if it is only one of many possibilities. Moreover, even granting that the district court has heard evidence of what constitutes coded drug language in other cases, reliance on that experience is improper when the law enforcement determines that the statements only "possibly" relate to drugs. It is improper for a district court to conclude that a defendant's knowledge of drug slang is indicative of prior dealing by that defendant. *U.S. v. Harrison,* 431 F. 3d 1007 (7th Cir. 2005). With such thin evidence that the coded language was referencing drugs, it was improper to conclude that the statements were proof of the defendant's drug dealing.

The district court also made a finding that the defendant, who had told probation that he had been a victim of a shooting in 1997, was lying about the circumstances that led to the shooting. The district court based this on the defendant's gang membership, and inferred that the shooting was gang related. The district court clearly erred, as mere membership in a gang does not turn every criminal act connected to the defendant into a gang related crime. The Seventh Circuit's conclusion that it was reasonable for the district court to conclude that the defendant was a liar or a gang member generally misses the point: the district court chose specific facts upon which it relied in concluding that the defendant had lied.

A conclusion based on erroneous fact finding is equally erroneous.

Next, the district court stated "I am going to make a finding that the drugs that Mr. Campos Ruiz saw you take into the bathroom are being flushed down the bathtub." Although the Court did not expressly state it, this is a reference to the PSR, where Campos-Ruiz states he sees the defendant go into the bathroom and come out wet. But Mr. Campos-Ruiz did not say that he saw the defendant take the drugs into the bathroom, at least according to the PSR. Rather, Campos-Ruiz stated that he saw the defendant dump some cocaine in a bag. Campos then saw the defendant enter the bedroom and come out wet. Campos-Ruiz simply does not say that he saw the defendant enter the bathroom with the cocaine. The district court's conclusion that he did is clearly erroneous.

The district court also made a finding that the defendant failed to serve a six month work release sentence for the state gun charge. The PSR contained no finding that the defendant did not serve the sentence. (PSR, pg. 8, ¶ 53) Both the Government and Officer Bohlen admitted that they did not know if the defendant actually served the sentence. The district court's finding was clearly erroneous, as it was not based on any credible evidence that the defendant did not complete the state sentence.

All of these findings were critical to the district court's sentence. As there were factual determinations critical to the defendant's sentence that were clearly erroneous, the Seventh Circuit's decision to review them for reasonableness was in error.

CONCLUSION

This Court should grant the writ to correct the error in this case. It should also grant the writ to clarify that reasonableness review is not a substitute for clear error review when the issue is sentencing related factual determinations. Considerations of sentencing accuracy, justified sentencing disparity, and meaningful appellate review of sentencing all favor the granting of the writ.

Respectfully Submitted,

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